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APR 9 1947

No. 718

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL WALSH, AN INDIVIDUAL TRADING AS KELP LABORATORIES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

No formal opinion was rendered by the district court. The oral opinion of the court sustaining appellee's motion to dismiss the criminal information appears at pp. 18-22 of the record.

JURISDICTION

The jurisdiction of this Court on direct appeal is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by section 238 of the Judicial Code, as amended, 28 U. S. C. 345. The order of the district court

dismissing the information against the appellee was entered September 18, 1946 (R. 22–23). The notice of appeal was filed October 17, 1946 (R. 23). This Court noted probable jurisdiction on December 16, 1946 (R. 25).

QUESTION PRESENTED

Section 301 (h) of the Federal Food, Drug, and Cosmetic Act prohibits the giving of a false guaranty to a receiver of any food, drug, device, or cosmetic to the effect that such article is not adulterated or misbranded within the meaning of the Act. The question is whether the giving of a guaranty which is false in respect of a shipment to a distributor in the same state is violative of section 301 (h), irrespective of whether the distributor in turn ships the article in interstate commerce.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 301 (21 U. S. C. 331). The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * * *
>
> (h) The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false,

except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 303 (c) (3), which guaranty or undertaking is false.

SEC. 303 (21 U. S. C. 333). (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

* * * * * *

(c) No person shall be subject to the penalties of subsection (a) of this section, * * * (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act,

or to the effect, in case of an alleged violation of section 301 (d), that such article is not an article which may not, under the provisions of section 404 or 505, be introduced into interstate commerce; or (3) for having violated section 301 (a), where the violation exists because the article is adulterated by reason of containing a coal-tar color not from a batch certified in accordance with regulations promulgated by the Administrator under this act, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the coal-tar color, to the effect that such color was from a batch certified in accordance with the applicable regulations promulgated by the Administrator under this Act.

SEC. 402 (21 U. S. C. 342). A food shall be deemed to be adulterated—

* * * * *

(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; * * *.

SEC. 403 (21 U. S. C. 343). A food shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

STATEMENT

The appellee was charged in an information in two counts filed in the district court on April 25, 1946, with having given a false guaranty in violation of section 301 (h) of the Federal Food, Drug, and Cosmetic Act (R. 1–5). The information

alleges in the first count that the appellee, doing business in San Diego, California, as Kelp Laboratories, in February 1943 gave to Richard Harrison Products, of Hollywood, California, a guaranty in the following terms (R. 1–2):

> The undersigned Kelp Laboratories, whose address is 3564 First Avenue, San Diego, Calif., hereby guarantees that no food, drug, device or cosmetic constituting, or being part of, any shipment or other delivery now or hereafter made to you by the undersigned will be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, or within the meaning of any applicable state or municipal law in which definitions of adulteration and misbranding are substantially the same as those contained in the Federal Food, Drug, and Cosmetic Act, or will be an article which may not, under the provisions of section 404 or 505 of said Act, be introduced into interstate commerce.
>
> This guaranty shall be a continuing guaranty and shall be binding upon the undersigned with respect to all foods, drugs, devices and cosmetics shipped or delivered to you by the undersigned (including goods in transit) before the receipt by you of written notice of the revocation thereof.[1]

[1] Continuing guaranties of this character are sanctioned by the following regulation promulgated under the Act (21 C. F. R. Cum. Supp., ch. 1, § 2.5):

"(a) A guaranty or undertaking referred to in section 303 (c) (2) of the Act may be:

The first count then alleges that on February 24, 1945, while the guaranty was in full force and effect, the appellee consigned to Richard Harrison Products, at Hollywood, a number of packages of a vitamin product, alleged to be a food within the meaning of section 201 (f) (1) of the Act (21 U. S. C. 321 (f) (1)), the labels of which represented that six tablets daily would furnish, *inter alia*, 10 milligrams of niacinamide, and would supplement the diet with one and one-half times the minimum adult daily requirement of vitamin B_1 and the full requirement of vitamin G (R. 2–3).[2] It is also alleged that "prior and subsequent [to the date of this shipment], the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant" (R. 3). The count charges that the shipment made on February 24, 1945, was adulterated within the meaning of section 402 (b) (1) (*supra*, p. 4) in that niacinamide, a valuable

"(2). General and continuing, in which case, in its application to any shipment or other delivery of an article, it shall be considered to have been given at the date such article was shipped or delivered by the person who gives the guaranty or undertaking."

Hence, the applicability of section 301 (h) to such an agreement is clear. See *Barnes* v. *United States*, 142 F. 2d 648, 650 (C. C. A. 9); *Glaser, Kohn & Co.* v. *United States*, 224 Fed. 84, 87 (C. C. A. 7).

[2] Section 201 (f) defines "food" as including "(1) articles used for food or drink for man or other animals."

constituent of the food, had been omitted in part since six tablets would not provide 10 milligrams of niacinamide as the labels represented, but only a smaller amount of that substance; and that, accordingly, the guaranty was false in respect of that shipment because of the adulteration (*ibid.*).

The second count is similar in pattern to the first and charges that the guaranty was also false for the reason that the food was misbranded within the meaning of section 403 (a) (*supra*, p. 4) in that the labels misrepresented the niacinamide content of the tablets (R. 3–4).

The appellee moved to dismiss the information on the ground that it does not state an offense, because the shipment on which the charges are based was to a consignee within California, the state of origin, and there is no allegation that the consignee purchased the order for someone outside of California or that it intended to sell the food in its interstate rather than its intrastate business. The motion alleged that the information is ineffective in this respect because "The act provides that the offense is a 'delivery for introduction into Interstate Commerce.'" (R. 5–6). Elaborating on this contention on argument of the motion, counsel for the appellee relied upon the reference in section 301 (h) to the guaranty defined in section 303 (c) (2), which, in turn, refers to section 301 (a). He argued that since section 303 (c) (2) relieves the holder of a

guaranty from the penalties of section 303 (a) for having violated section 301 (a) by introducing a misbranded or adulterated article into interstate commerce, the prohibition of section 301 (h) against giving a false guaranty is likewise limited in its application in accordance with the provisions of section 301 (a), i. e., that section 301 (h) applies only to a guaranty which is false in respect of an interstate shipment, or, as counsel put it, "that guarantee is made in reference to the misdemeanor or crime that would be committed under 331 (a) [sec. 301 (a)]"; "the guarantee was never intended to cover anything that is intrastate" (R. 10); "The falsity described in Section 331 (h) [sec. 301 (h)] must be defined in terms of the conduct prohibited by Section 331 (a) [sec. 301 (a)]" (R. 11). Counsel also asserted that section 301 (h) could not constitutionally be applied in respect of an intrastate shipment (R. 9, 10–11), but later, in his rebuttal, he indicated that he was resting on his construction of the statute (R. 18).

In an oral opinion sustaining the motion to dismiss the information (R. 18–22), the district judge indicated that he had some doubt as to the constitutionality of section 301 (h) as it is sought to be applied here, for he stated at the outset that "Unless the act can be justified under the interstate commerce laws (*sic*) of the Constitution, of course it is unconstitutional" (R. 18). After referring to several recent decisions of this Court

dealing with the scope of the application of the Fair Labor Standards Act to various types of employees, the judge asked the rhetorical question, "will the Supreme Court extend or interpret the particular sections of this particular Food and Drug Act as they have the Fair Labor Standards Act?" (R. 20.) Stating that the issue of the application of section 301 (h) in respect of an intrastate shipment "is a very close question" (R. 21), the court adverted to the rule of strict construction of criminal statutes and said that it could not be presumed that the shipment in question had been or would be placed in interstate commerce "and thus bring the defendant within the terms of the act" (*ibid.*). The court concluded that the information should be dismissed "on all the grounds urged by the defendant" (R. 22). In final analysis, therefore, the court's decision rests—primarily, at least—on the view that, as a matter of construction, section 301 (h) "applies only to a guaranty which is false in relation to a shipment introduced or delivered for introduction into interstate commerce."

SPECIFICATION OF ERRORS TO BE URGED.

The district court erred:

1. In holding that the information did not state an offense under section 301 (h) of the Federal Food, Drug, and Cosmetic Act.

2. In holding that section 301 (h) of the Federal Food, Drug, and Cosmetic Act does not

apply to the giving of a false guaranty in respect of a shipment in intrastate commerce unless the consignee introduces the shipment into interstate commerce.

3. In holding that the appellee's giving of a false guaranty, as charged in the information, did not constitute a criminal violation of section 301 (h) of the Federal Food, Drug, and Cosmetic Act, because he was not charged with having given a false guaranty in respect of a shipment introduced into interstate commerce.

4. In granting the motion to dismiss the information.

SUMMARY OF ARGUMENT

I. No constitutional problem is involved in construing section 301 (h) of the Federal Food, Drug, and Cosmetic Act as positively prohibiting the giving of any false statutory guaranty, irrespective of whether the article to which it relates is ultimately introduced into interstate commerce. By giving a guaranty, the guarantor assures the distributor that the warranted goods may be shipped in interstate commerce without further inspection by him. Hence, the very act of giving a false guaranty has a direct effect upon interstate commerce and the federal purpose to keep the prohibited articles out of the channels of such commerce. Section 301 (h), so construed, is constitutionally valid whether it be viewed as an incident to the regulation of interstate com-

merce embodied in the Act, or as an effective means of enforcement, or as a protection of the integrity of documents created for purposes of interstate commerce.

II. Section 301 (h) positively prohibits the giving of any false guaranty that an article is not adulterated or misbranded within the meaning of the Act. The cross reference in that section to section 303 (c) (2) for a definition of the type of guaranty to which it applies, and the further reference in section 303 (c) (2) to section 301 (a) in defining the exemption from criminal penalties granted to a holder of a guaranty who has made an interstate shipment violative of section 301 (a), do not warrant engrafting upon the application of section 301 (h) the limitations of section 301 (a).

Under the earlier Food and Drugs Act of 1906, the liability of a dealer for having made an interstate shipment in violation of that act was transferred to the guarantor; the giving of a false guaranty was not, as such, prohibited. The present law rejects the substitution theory of liability of the guarantor; instead, section 301 (h) flatly prohibits the giving of a false statutory guaranty. This history demonstrates that the section was intended to apply to any false guaranty, without regard to whether the falsity is related to an interstate shipment.

III. Our construction of section 301 (h) promotes the great purposes of the Act to protect the

consuming public against adulterated and misbranded foods and drugs. For as we construe it, the section strikes at the roots of the evil at which the Act is directed by prohibiting and punishing at the source the harmful effects of falsely warranting that an article is not adulterated or misbranded and thus may be distributed in interstate commerce without further inspection.

The rule that criminal statutes must be strictly construed does not require that section 301 (h) be given a narrow construction wholly inconsistent with its evident meaning and the broad purposes of the Act.

ARGUMENT

The only question raised by the motion to dismiss and the ruling below is whether section 301 (h) of the Federal Food, Drug, and Cosmetics Act, prohibiting the giving of a false guaranty that any food, drug, device, or cosmetic is not adulterated or misbranded within the meaning of the Act, is applicable to such a guaranty which is false in respect of a shipment by the guarantor to the holder of the guaranty in the same state. In the instant case, although the information alleges that the holder had, both before and after the date of the shipment involved here, distributed quantities of the appellee's product in interstate commerce, there is no allegation that this particular shipment, or any part of it, was so distributed, and it was on this basis that the

appellee challenged the validity of the information to charge an offense under section 301 (h). While the court below expressed some doubt that section 301 (h) may constitutionally be applied in such a situation, its holding was, in effect, that by the terms of the Act itself, where the initial shipment is intrastate, this provision is not applicable unless and until the holder of the guaranty introduces the article to which the falsity relates into interstate commerce. The Government's position is that section 301 (h) applies *ipso facto* to the giving of any statutory guaranty which is false, irrespective of whether the holder of the guaranty ultimately distributes the adulterated or misbranded article in interstate or intrastate commerce; and that the district court's doubts as to the constitutionality of the section as applied to intrastate distribution are not well founded.

I

THE POSITIVE PROHIBITION OF SECTION 301 (h) AGAINST GIVING ANY STATUTORY GUARANTY WHICH IS FALSE IS CONSTITUTIONAL AS APPLIED TO AN INTRASTATE SHIPMENT

At the outset, we think it is clear that no constitutional problem is involved in the construction of section 301 (h) for which we contend. It hardly needs reiteration now that Congress may legislate in respect of "those activities intrastate which so affect interstate commerce, or the exercise of the power of Congress over it, as to make regulation of them appropriate means to the

attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119; see also *Wickard* v. *Filburn*, 317 U. S. 111, 124; *United States* v. *Darby*, 312 U. S. 100, 118–122; *Currin* v. *Wallace*, 306 U. S. 1.

When a manufacturer or processor expressly guarantees that a product is not adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, he obviously contemplates that such goods may move within the sphere covered by the federal act. And, since, by his guaranty, he assures his dealer that the goods may be so shipped in interstate commerce without further inspection by the dealer, the mere giving of the guaranty has a direct effect on the federal purpose to keep impure foods and drugs out of the channels of interstate commerce.

The absolute prohibition of a false guaranty, whether or not the illicit article ultimately moves in interstate commerce, falls within a number of patterns in which the regulation of intrastate activities has been upheld because of the relation of such activities to interstate commerce. It may be sustained on the ground that Congress having adopted the policy of excluding adulterated and misbranded articles from interstate commerce, it may choose "means reasonably adapted to the attainment of the permitted end, even though they in-

valve control of intrastate activities," *United States* v. *Darby*, *supra*, at 121; or on the ground that in sales by a manufacturer or processor to a distributor, interstate and intrastate commerce are so commingled that regulation of the intrastate transactions is incidental to and inseparable from regulation of the interstate activity. *United States* v. *New York Central Railroad*, 272 U. S. 457, 464. See also *Baltimore and Ohio Railroad* v. *Interstate Commerce Commission*, 221 U. S. 612, 619; *Southern Railway Co.* v. *United States*, 222 U. S. 20, 27. It can be supported on the theory that a flat prohibition is necessary because it is not known at the outset whether the goods will or will not move in interstate commerce. See *Mulford* v. *Smith*, 307 U. S. 38, 47, where tobacco marketing regulations affecting goods intended for intrastate shipment were sustained on the theory that since it was not known whether the products were destined for intrastate or interstate commerce, effective regulation required uniform application to all sales. It comes within the holding of this Court in *Thornton* v. *United States*, 271 U. S. 414, where inspection and preventive treatment of all cattle in a diseased area were required in order to prevent shipment of some of the cattle in interstate commerce without such treatment. It also falls within the theory of *Westfall* v. *United States*, 274 U. S. 256, 259, where this Court upheld the power of Congress to punish misapplication

of funds of a state bank belonging to the Federal Reserve System, even though there might be no loss to the reserve banks, on the theory that "when it is necessary, in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." See also *United States* v. *Darby, supra,* at 121, and cases cited. A close analogy is presented by *United States* v. *Ferger,* 250 U. S. 199, in which this Court upheld the power of Congress to punish forgery and uttering of fictitious bills of lading purporting to represent goods which do not exist and therefore would not be shipped in interstate commerce. This Court there said (p. 205):

> Nor is the situation helped by saying that as the manufacture and use of the spurious interstate commerce bills of lading were local, therefore the power to deal with them was exclusively local; since the proposition disregards the fact that the spurious bills were in the form of interstate commerce bills which in and of themselves involved the potentiality of fraud as far-reaching and all-embracing as the flow of the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate.

In short, whether the positive prohibition against a false guaranty, even as to goods which may not be introduced into interstate commerce,

be justified as incidental to the regulation of interstate shipments, or as an effective means of enforcement, or as a protection of the integrity of documents created for purposes of interstate commerce, it is clearly an appropriate means of effectuating the purposes of the Federal Food, Drug, and Cosmetic Act, and hence a constitutional exercise of Congressional power.

II

THE LANGUAGE AND HISTORY OF SECTION 301 (h) SHOW THAT IT IS UNRESTRICTED IN ITS APPLICATION TO FALSE STATUTORY GUARANTIES

(a) *The terms of the statute.*—Section 301 (h) positively prohibits the "giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false"; by its own terms it excepts only a false guaranty given by a person who, in turn, relied upon a similar guaranty given by the person from whom he received in good faith the adulterated or misbranded article. With this single exception, the section plainly makes it unlawful to give any false statutory guaranty; there is nothing in the language of the section itself limiting its application only to guaranties related to articles introduced or delivered for introduction into interstate commerce.

The appellee, however, would import such a limitation into the section; he contends that since section 301 (a) prohibits only the interstate shipment of adulterated or misbranded articles, sec-

tion 301 (h) should be similarly limited. His argument is pitched upon the words "referred to in section 303 (c) (2)" appearing in section 301 (h) and the further reference in section 303 (c) (2) to section 301 (a).

We think it clear that these cross references furnish no support for the appellee's construction of section 301 (h). That section does not itself define the type of guaranty or undertaking, the falsification of which is prohibited, but simply refers to section 303 (c) (2) for such definition. In drafting the legislation it was, of course, necessary to mention the guaranty in both sections in order to accomplish the dual purpose to relieve the holder of a guaranty from the criminal penalties provided by section 303 (a) for shipping illicit articles in interstate commerce (see. 303 (c) (2)), and to protect the integrity of such

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In this connection, it is important to note that the prohibitions of section 301 and the penalties provided by section 303 (a) for violations of section 301 are absolute; consciousness of illegality is not an element of the prohibited acts. See *United States* v. *Dotterweich*, 320 U. S. 277, 280-281. The statute recognizes, however, that many interstate shippers are merely distributors who are not in a position to maintain controls adequate to assure that the products they handle are not adulterated or misbranded. Accordingly, to protect such distributors against application of the criminal penalties, Congress provided them with a valid defense in the event of prosecution by specifying in section 303 (c) that the penalties shall not apply to a person who establishes an appropriate guaranty—in the situation presented by this case, a guaranty by the person from whom he received the

guaranties by making the act of giving of a false guaranty itself an offense (sec. 301 (h)). Congress could, of course, have set forth the definition of the guaranty in both sections, but apparently because of its greater aptness in section 303 (c) (2) in expressing the purpose of that section, Congress chose to describe it in detail there and, in the interest of brevity and economy of language, to use the cross reference device in section 301 (h).[1] And the language it used in section 301 (h) for that purpose is obviously language of reference, not of limitation.

Nor is there anything in section 303 (c) (2) which supports the appellee's contention. The pertinent language of that section is: "no person shall be subject to the penalties of subsection (a) of this section, * * * (2) for having violated section 301 (a) or (d)[2] if he establishes a guaranty

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article that it is not misbranded or adulterated within the meaning of the Act."

[1] In this connection, see S. Rep. No. 152, 75th Cong., 1st sess., p. 2: "The bill has been made shorter and less verbose than previous bills. That has been done without deleting any effective provisions." See also *United States* v. *Petrillo*, 332 U. S. 277, 282.

[2] Subsection (d) prohibits the introduction or delivery for introduction into interstate commerce of (1) a class of food which may, by reason of contamination with microorganisms during manufacture or processing in any locality, be injurious to health, unless the manufacturer or processor holds a permit from the Administrator prescribing conditions under which the food may be manufactured or processed (see sec. 404); and (2) any new drug unless an effec-

or undertaking *signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect,* in case of an alleged violation of section 301 (a), *that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act."*[8] It is evident that, for the purposes of the problem here, the italicized language constitutes the only part of this provision which is definitive of the words "guaranty" and "undertaking" appearing in section 301 (h) and, therefore, only this part is incorporated by reference in that section. Since section 303 (c) defines different types of guaranties which will save holders harmless from the penalties provided for violations of sections 301 (a) and 301 (d) (see footnotes 5 and 6, *supra*, ~~pp. 18-19~~), it was necessary to refer to those sections in defining the guaranties. But these references are merely descriptive of the situations in which

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tive application with respect to such drug has been filed with the Administrator (see sec. 505). Section 303 (c) (2) also provides for guaranties against both types of violations defined in section 301 (d).

[8] It should be noted that section 301 (a) also prohibits the interstate shipment of a food which bears or contains a ~~color~~ tar color other than one from a batch certified in accordance with regulations promulgated by the Administrator, for section 402 (c) declares that such use of any uncertified coal-tar colors shall constitute adulteration. Section 303 (c) (3) protects a shipper of any food which is so adulterated if he establishes a guaranty from the manufacturer of the color that it was from a certified batch.

a shipper of a prohibited article shall be protected against the imposition of criminal penalties if he holds an appropriate guaranty; they cannot properly be regarded as part of the definitions of guaranties contained in section 303 (c) and incorporated by reference in section 301 (h); and they furnish no warrant for reading into the otherwise unqualified prohibition of section 301 (h) the limitation upon the application of section 301 (a) to shipments introduced or delivered for introduction into interstate commerce.

(b) *The history of the guaranty provisions.*— A comparison of the guaranty provisions of the present law with their precursor in the Food and Drugs Act of 1906 likewise supports our construction of section 301 (h). Section 9 of the 1906 Act provided (34 Stat. 768, 771):

> That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to afford profection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

That provision merely substituted the guarantor for the dealer for the purposes of prosecution and the penalties provided by Section 2 of the 1906 Act for shipping adulterated or misbranded articles in interstate commerce. Hence, the guarantor was not liable on account of a false guaranty unless the dealer had shipped the prohibited article in interstate commerce. See *Steinhardt Bros. & Co.* v. *United States*, 191 Fed. 798, 800 (C. C. A. 2); *United States* v. *Charles L. Heinle Specialty Co.*, 175 Fed. 299, 300-301 (E. D. Pa.). No liability attached for the act alone of giving a guaranty which was false.

As we have seen, Congress in the 1938 Act adopted a different approach to the problem of false guaranties. That statute was preceded by years of intensive study and debate in Congress on proposed changes in the existing food and drug law. The early bills introduced during this period contained guaranty provisions almost identical with the corresponding provisions of section 9 of the 1906 Act.[7] In the final stages of the legislative process, however, the present provisions were adopted.[8] While the legislative history of the 1938 Act does not otherwise contain any ex-

[7] See S. 1944, 73d Cong., 1st sess., sec. 17 (e); S. 2000, 73d Cong., 2d sess., sec. 17 (e); S. 2800, 73d Cong., 2d sess., sec. 17 (e); S. 5, 74th Cong., 1st sess., sec. 708 (e).

[8] These provisions first appeared in Committee Print No. 3, August 19, 1937, House Committee on Interstate and Foreign Commerce, of S. 5, 75th Cong., 1st sess., the bill which was finally enacted.

planation of the reasons for this change, it is apparent from the face of the statute that Congress deliberately abandoned the scheme of the earlier law whereby the guarantor was merely substituted for the dealer if and when the latter shipped an adulterated or misbranded article in interstate commerce. The guaranty device as a means of protecting interstate distributors against criminal liability was retained in section 303 (c), but in lieu of the substitution theory of the old law, Congress added section 301 (h) flatly prohibiting the giving of a guaranty which falsely warrants that an article is not adulterated or misbranded within the meaning of the Act. The only conditions of liability for a violation of this section are that the guaranty is false and that it be of the type defined by reference in section 303 (c), i. e., a guaranty which would protect the distributor against the criminal penalties of section 303 (a) in the event he ships an adulterated or misbranded article covered by the guaranty in interstate commerce and is thereafter charged with a violation of section 301 (a) or (d).

In the light of this history, it is clear, we think, that Congress did not intend in these provisions, as the appellee in effect insists, to accomplish by a different device merely the same result as was accomplished by the substitution theory of the 1906 Act in respect of interstate distribution. For, obviously, if Congress had intended that result, it would simply have reenacted the provisions

of the earlier statute. In view of the purpose of the law to prevent adulterated and misbranded articles from being introduced into the channels of intertsate commerce, the only logical inference to be drawn from the adoption of the entirely new basis of liability embodied in section 301 (h) is that Congress intended to impose absolute liability for giving a false guaranty, without regard to whether the guaranteed article is ultimately shipped in interstate or intrastate commerce. See Toulmin, *The Law of Foods, Drugs and Cosmetics* (1942), p. 62.[9]

Such a construction of section 301 (h) comports with and furthers the express congressional intention to preserve in the present law the best features of the 1906 Act and at the same time to

[9] *Barnes* v. *United States*, 142 F. 2d 648 (C. C. A. 9), contains a dictum to the contrary. The Ninth Circuit there correctly said (p. 650) that liability under section 301 (a) for introducing an adulterated or misbranded article into interstate commerce may be avoided if the shipper holds a guaranty. But the court went on to say that in such circumstances "the liability is then imposed upon the guarantor" by virtue of section 301 (h), and that "under the statutory scheme the falsity described in the latter section must be defined in terms of the conduct prohibited by" section 301 (a). The fundamental error in the court's reasoning is its assumption that, as under the 1906 Act, the guarantor's liability is contingent upon whether the article is eventually distributed in interstate commerce. As we have shown, this construction is not permissible under the terms of section 301 (h) or its history. In any event, the question involved here was not present in the *Barnes* case, for the shipments were introduced directly into interstate commerce by the guarantor-defendants on behalf of their dealer.

"strengthen and extend that law's protection of the consumer" (S. Rep. No. 152, 75th Cong., 1st sess., p. 1; see also H. Rep. No. 2139, 75th Cong., 3d sess., p. 1). In *United States* v. *Dotterweich*, 320 U. S. 277, this Court recognized and enforced this purpose in holding that the responsible officers of a corporation as well as the corporation itself, are subject to liability for violations of section 301, even "though consciousness of wrongdoing be totally wanting" (p. 284). The Court stated (p. 282) that "Nothing is clearer than that the later legislation was designed to enlarge and stiffen the penal net and not to narrow and loosen it." This admonition is particularly appropriate here in view of the rejection in the present law of the scheme of the 1906 Act whereby the guarantor's liability on account of a false guaranty was contingent upon the act of another person and the adoption, instead, of a positive prohibition against giving a false statutory guaranty.

III

THE GOVERNMENT'S CONSTRUCTION OF SECTION 301 (h) PROMOTES THE BROAD PURPOSES OF THE ACT

We have shown (*supra*, pp. 13–16) that the construction of section 301 (h) for which we contend does not pose any question of constitutionality. Our discussion at this point relates to the practical aspects of the issue involved in this case.

The primary objective of the Act is to protect the consuming public against deleterious, adulterated, and misbranded foods, drugs, devices, and cosmetics. This Court has said that—

> The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. (*United States* v. *Dotterweich*, 320 U. S. 277, 280.)[10]

We think that the setting of section 301 (h) in the broad scheme of the Act and its relation to the Act's salutary purposes also support our view as to the proper construction. A manufacturer or processor who guarantees that his products are not adulterated or misbranded obviously intends to assure his dealers that, without fear of incurring the penalties of the Act, they may if they choose distribute those products in interstate commerce; and at the same time he obtains sales and promotional advantages accruing from his warrant of compliance with the Act. By the same token, the very existence of the guaranty has a tendency to encourage interstate distribution without the safeguard of an independent investi-

[10] See also *United States* v. *Antikamnia Chemical Co.*, 231 U. S. 654, 667.

gation or analysis by the dealer to ascertain whether the articles are in fact adulterated or misbranded. Under the district court's construction of section 301 (h), following the pattern of the 1906 Act, the manufacturer or processor is not criminally liable on account of a false guaranty until the prohibited article is actually introduced into interstate commerce by the dealer and the purpose of the Act thereby frustrated. So construed, the threat of punishment is minimized, because it would depend upon the success of the Government in tracing an individual illegal shipment into interstate commerce. As we interpret section 301 (h), criminal responsibility attaches before the falsely guaranteed article is introduced into interstate commerce, for as so construed it prohibits *ipso facto* the giving of false guaranties. The result is that the detection and enforcement processes are greatly simplified, the certainty of punishment enhanced, and a greater deterrent provided against the giving of false guaranties. So construed, the section effectively strikes at the very roots of the evil at which the Act is directed by prohibiting and punishing at the source the harmful effects of falsely warranting that an article is not adulterated or misbranded and therefore may be distributed in interstate commerce.

Finally, the doctrine of strict construction of criminal statutes, upon which the district court

relied, does not require that its interpretation of section 301 (h) be adopted. To paraphrase the language of this Court in the *Dotterweich* case, 320 U. S. at 283, which is equally appropriate here, the history of section 301 (h), its relation to the broad purposes of the Act, its terms, and relevant practical considerations all refute the district court's construction, "once 'we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule.'" The rule of strict construction "does not require distortion or nullification of the evident meaning and purpose of the legislation." *United States* v. *Gaskin*, 320 U. S. 527, 529–530.

CONCLUSION.

For the foregoing reasons, the order of the district court should be reversed.

Respectfully submitted.

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APRIL 1947.